IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-758

DAVID DELCOURTE and JOHN T. MEAGHER,

Plaintiffs-Appellants,

vs.

STATE BOARD OF ELECTIONS, MICHAEL J. LUCCHESI, DOE W. ADAMS, WILLIAM K. HARRIS and FRANKLIN J. LUNDIGREN, Members of the State Board of Elections; DAN WALKER, Governor of the State of Illinois; MICHAEL J. HOWLETT, Secretary of State of Illinois; ALAN J. DIXON, Treasurer of Illinois; GEORGE W. LINDBERG, Comptroller of the State of Illinois; EDWARD J. ROSKI, Treasurer of Cook County; and STANLEY T. KUSPER, JR., County Clerk of Cook County,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division,
74 C 3591

MOTION TO DISMISS OR AFFIRM

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Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
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MOTION TO DISMISS OR AFFIRM

NOW COME the defendants-appellees in the above entitled cause and respectfully move this Court pursuant to Supreme Court Rule 16 to dismiss the appeal on the grounds that the question presented is so insubstantial as not to require further argument, or alternatively, that the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, be affirmed since it is clearly correct.

OPINION BELOW

The opinion of the three judge court below, entered September 3, 1975, is reported at 400 F. Supp. 1005 (N.D. Ill. 1975).

STATEMENT OF THE CASE

This appeal questions the constitutionality of Article VI, Section 12(d) of the 1970 Illinois Constitution which provides:

> "... a ... judge who has been elected to that office may file ... a declaration of candidacy to succeed himself ... The names of judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question whether each judge shall be retained in office for another term. ... The affirmative vote of three-fifths of the electors voting on the question shall elect the judge to the office ..."

Plaintiff-Appellant sought to have Article VI, Section 12(d) declared unconstitutional, and to enjoin its enforcement.

On September 3, 1975, a three judge court granted defendants' motion alternatively to dismiss the amended complaint or for summary judgment. Plaintiff-Appellant Meagher has filed Notice of Appeal to the United States Supreme Court, and a Jurisdictional Statement.

ARGUMENT

I.

THE QUESTION PRESENTED IS SO INSUBSTANTIAL AS NOT TO REQUIRE FURTHER ARGUMENT.

Plaintiff-appellant contends that, as a voter, he was denied equal protection of the laws guaranteed by the Fourteenth Amendment. He maintains that the state constitutional requirement for a three-fifths affirmative vote for retention of an incumbent judge dilutes and debases the votes of those persons voting for retention.[1] In prior decisions this Court has thoroughly considered and properly disposed of arguments analogous to those made herein by Plaintiff-Appellant.

In *Gordon* v. *Lance*, 403 U.S. 1 (1971) this Court upheld the constitutionality of a requirement that 60% of the voters in a referendum election must approve any proposed bonded indebtedness. After consideration of "one person-one-vote" decisions, the Court found no violation of equal

1. A retention candidate is not subject to nomination in a primary election, and faces no opponent on the retention ballot. Judge Lefkovits received 351,607 votes for retention. Every losing countywide candidate on the partisan contested judicial ballot received a greater number of votes than Judge Lefkovits. See Abstract of Votes attached to State defendants' motion to dismiss the amended complaint. Since it is possible for a judge to receive the requisite three-fifths vote and to be retained in office with less votes than are cast for candidates who are defeated in contested elections, one could argue with equal force that it is actually the votes of the supporters of those defeated candidates which would be diluted and debased by the retention option.

protection of the laws. See *Gray* v. *Sanders*, 372 U.S. 368 (1963); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); and by reference *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966); *Kramer* v. *Union Free School Dist.*, 395 U.S. 621 (1969); *Carrington* v. *Rash*, 380 U.S. 89 (1965) and *Fortson* v. *Morris*, 385 U.S. 231 (1966).

The principle enunciated in *Gordon* is not distinguishable from a three-fifths majority requirement for retention of incumbent judges.[2]

Finally, the facts at issue herein do not present a case of vote dilution or debasement. *Reynolds* v. *Sims*, 377 U.S. 533 (1964). This Court has never found dilution or debasement merely because a balloting system provides that the will of less than a majority may prevail. *Fortson* v. *Morris*, 385 U.S. 231 (1966).

2. A number of courts have concluded that the one person-one vote principle does not require that the judiciary be appointed on a population basis. *Holshouser* v. *Scott*, 335 F. Supp. 928 (N.D. N.C. 1971) (3-judge court), aff'd 409 U.S. 807 (1972); *Wells* v. *Edwards*, 347 F. Supp. 453 (N.D. La. 1970) (3-judge court), aff'd 409 U.S. 1095 (1973); *New York Ass'n of Trial Lawyers* v. *Rockefeller*, 267 F. Supp. 325 (S.D. N.Y. 1967); *Buchanan* v. *Rhodes*, 249 F. Supp. 860 (N.D. Ohio, 1962); *Stokes* v. *Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964) (3-judge court).

II.

THE JUDGMENT OF THE THREE-JUDGE DISTRICT COURT IS CLEARLY CORRECT.

The three-judge court of the United States District Court for the Northern District of Illinois, Eastern Division, relied on uncontroverted principles of constitutional law in finding no denial of equal protection of the laws. The court found *Gordon* v. *Lance*, 403 U.S. 1 (1971) applicable to the subject matter of this appeal. Recognizing that Illinois' judicial retention system is comparable to the bond referendum at issue in *Gordon*, the court found that the requirement for a three-fifths affirmative vote did not violate the equal protection clause.

Next, the court noted the absence of any geographic discrimination or "fencing out" of a particular group. *Gray* v. *Sanders*, 372 U.S. 368 (1963); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969). Plaintiff's theory of dilution or debasement was rejected as inconsistent with the "one person-one vote" principle established in *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Gray* v. *Sanders*, 372 U.S. 368 (1963).

The court also noted this Court's rejection of a strict majoritarian philosophy upon which Plaintiff relies. *Gordon* v. *Lance*, 403 U.S. 1 (1971), *Abate* v. *Mundt*, 403 U.S. 182 (1971) and *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971).

Finally, plaintiff's assertion that he was a member of an identifiable class was rejected. The court found no identifiable class except perhaps a group that may rise up in the future to defeat retention of some incumbent judge.

Accordingly, the District Court's decision is clearly correct and should be affirmed.

CONCLUSION

Wherefore, the Defendants-Appellees respectfully pray that the appeal be dismissed or, in the alternative, that the decision of the three-judge District Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Herbert Lee Caplan, Assistant Attorney General, a member of the bar of the Supreme Court of the United States, and counsel for State defendants-appellees, hereby certify that I have this 14th day of January, 1976 served three copies of the foregoing Motion to Dismiss or Affirm upon Kevin M. Forde and John J. Kennelly, 111 W. Washington St., Chicago, Ill. 60602; Bernard Carey, State's Attorney of Cook County, Ill., 500 Civic Center, Chicago, Ill. 60602, Attn: Sheldon Gardner and John G. Sahn; John F. McCarthy, 100 W. Monroe St., Chicago, Ill. 60603; Maurice J. McCarthy, 55 E. Monroe Street, Rm. 4618, Chicago, Ill. 60603; and Arnold B. Kanter, Harold C. Hirshman, 8000 Sears Tower, Chicago, Illinois 60606, by depositing same, first class postage prepaid in the United States mail chute at 160 North LaSalle, Chicago, Illinois. All parties required to be served have been served.

HERBERT LEE CAPLAN